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Personality Testing by the Schools: A Possible Invasion of Privacy

ANGELIKA HOYMAN

The maintenance of familial and individual privacy has long been a valued cultural norm in Anglo-American society. For example, the recognized "family unit" has been primarily nuclear, instead of extended or polygamous, since the Eighteenth Century. A further indication of the emphasis placed on privacy in this culture is found in the primacy of one-family dwellings. The internal structure of these dwellings also attests to the value placed on privacy. If servants are regularly present in the home, they have their own private living quarters. Rooms are functionally specialized so that dining activities are kept separate from sleeping ones, *etc.*, and sleeping ones are increasingly kept "individual" in that most family members have their own bedrooms.¹

The advancement of scientific knowledge and technology, especially as directed to the human condition, has been equally valued. For instance, public schools are teaching children the principles of general science at an increasingly early age. The public voluntarily contributes to institutions whose *raison d'être* is the promotion of scientific research.² In addition, millions of tax dollars are spent to support specifically psychological research.³

This support began around the turn of the century with the development of the first "personality" measure in a test format, the precursor of the widely accepted Stanford-Binet Intelligence Test.⁴ During World War I, the United States government administered an early psychological test, the "Army Alpha Examination", to over one million servicemen.⁵ Since then, the use of structured personality tests to measure the two concepts of personality, the cultural-specific "normal-abnormal" concept and the "dominant personality traits" concept,⁶ has become firmly entrenched. Miller reports in *The Assault on Privacy* (1971) that in 1960 the Federal Office of Education financed what is termed a "Project Talent". Approximately one million school children were given various personality-measuring tests. The data collected by the project was

computerized and funneled back to the respective school guidance counselors.⁷

Contemporary critics, concerned with the maintenance of personal privacy, have termed the use of personality tests a “white glove rack and screw”.⁸ Monroe H. Freedman, Dean of Hofstra University School of Law, while testifying before a congressional subcommittee, compared the use of psychological tests to the administration of truth serums and found both to be an affront to personal dignity.⁹

Nevertheless, the 1960’s witnessed a three-fold increase in the number of school counselors employed in most schools and a nation-wide survey of these counselors indicated that at least one-third of their time was spent in dealing with the personal problems of students.¹⁰ It was only to be expected that diagnostic aid would be sought more and more frequently in the form of structured forced-choice psychological inventories, especially in light of the intrinsic ease in administration and scoring of such tests. In 1973 in Morristown, Pennsylvania, the inevitable occurred: the inherent conflict between familial and individual privacy interests and the use of personality tests came to a head in the case of *Merriken v. Cressman*.¹¹

In *Merriken*, the plaintiffs, eighth grade student Michael Merriken and his mother, brought suit to enjoin the local school district from implementing a program that employed the use of personality tests in identifying potential drug users. The program, entitled “Critical Period of Intervention”, consisted in part of test questionnaires that delved into the plaintiff’s family background and into his perceptions of his family relationships. He was also asked to identify classroom peers exhibiting inappropriate or deviant behavior.

The second stage of the program was “intervention”, an attempt to “change the cognitive and affective domains of potential drug abusers” through therapy that was specifically referred to as “compulsory”.¹² Those students demonstrating consistently deviant behavior could receive group sanctions as part of the therapy agenda. When “responsible school personnel” felt that an individual student’s needs exceeded school resources, they would be able to refer such students and their families to community mental health services. In addition, classroom teachers were asked to serve as “role models” for two children identified by the tests as “emotionally handicapped”. When serving as such models for disturbed children, the teachers were to receive background information on the children.

As the program was originally proposed, no provision for the requirement of affirmative parental consent was included and the students were not to be informed of the “voluntary” nature of completing the questionnaire. However, after suit was instituted, the school board resolved to obtain such consent from parents and to tell students of their option to refuse to participate in the program. The Court granted the injunction on the grounds that the “Critical Intervention Program” would constitute an invasion of the plaintiff’s rights of privacy despite the school board’s attempt to gain parental consent.

The *Merriken* court noted various areas of concern in enjoining the implementation of the "Critical Period of Intervention" program. First, it examined the actual test questions themselves and found that they invaded the Constitutionally protected privacy of family relationships and child rearing.

Second, the court was concerned that the consent the school board obtained from the parents was less than satisfactory. The court held that the consent received did not meet the required standards for waivers of the Constitutional rights to privacy; they felt that the information given to parents regarding the program was insufficient to ensure "informed" and voluntary choices on their part. Particular attention was paid to the possible negative effects of the testing on the children and the inadequate presentation of such possible effects to the plaintiffs.

The ultimate use of the test results was another area of grave concern to the court in *Merriken*; the fact that strict confidentiality of the results was not maintained was specifically mentioned.

Following the analysis used by the *Merriken* court, it is the purpose of this paper to analyze the test questions found in several widely used personality inventories to determine the extent to which they violate zones of privacy arguably emanating from the First and Fifth Amendments. The potential adverse effects of testing, the adequacy of the information presented to parents, and the confidentiality of test answers and scores will also be considered. Finally, the balancing test used by the *Merriken* court will be analyzed in terms of the factors to be considered when balancing the state's interests against those of individuals and families, and of the over-all implications of the balancing approach.

TEST QUESTIONS AS INVASIONS OF PRIVACY

In determining that the "Critical Period of Intervention" program invaded Constitutionally protected zones of privacy, the *Merriken* court scrutinized the actual questions presented on the test questionnaire. The court specifically noted questions dealing with whether or not the plaintiff's family was "very close, somewhat close, not too close, or not close at all", whether or not the plaintiff's parents told him "how much they loved him", whether or not the plaintiff's parents seemed "to know what his needs or wants are", and whether or not the plaintiff felt "loved by his parents". Such questions were characterized as "highly personal" and as pertaining "directly to an individual's family relationship and his rearing."¹³ The conclusion of the court was that the entire family relationship was second only to the marital one in terms of its highly private nature and that the above questions' invasion of that private relationship violated the plaintiffs' rights of privacy.

This decision of the *Merriken* court is supported by two recently decided cases establishing a Constitutional basis for privacy rights. Ten years ago the United States Supreme Court in *Griswold v. Connecticut*¹⁴ struck a Connecticut law that made the use of contraceptives by married persons criminal. In doing so, the court held that marital relations were encompassed in a "basic and fundamental" right of privacy protected by

the Constitution from state abridgement.¹⁵ In 1973, the United States Supreme Court again recognized the existence of Constitutionally guaranteed rights of privacy in *Roe v. Wade*.¹⁶ The opinion in *Roe* found that the Fourteenth Amendment assurances of personal liberty and privacy embraced the right of a woman to abort unwanted pregnancies. In fact, judicial opinions delineating the extent of these rights of privacy in view of the *Griswold* decision (even before *Roe*) “consistently have upheld the right of privacy with regard to home and family”.¹⁷ Consequently, the *Merriken* court’s high valuation of familial privacy must be viewed as a judicially sound one.

The *Merriken* court’s treatment of the test questions suggested that there are two analytically distinct zones of familial privacy: that of childrearing specifically and that of the perceived emotional family interactions and interrelations generally. The court stated that it would examine “the factual situation as it relates to family relationships and child rearing”.¹⁸

The court cited *Prince v. Massachusetts*¹⁹ as establishing the right in the area of family relationships. In *Prince* the United States Supreme Court held that familial relations were not beyond state regulation in the public interest. Accordingly, it upheld a state statute prohibiting minors from selling magazines in public places. However, in doing so the court did acknowledge the “private realm of family life that the state cannot enter”.²⁰

The *Merriken* court found precedent for the right of privacy in childrearing in two cases. The first of these, *Pierce v. Society of Sisters*²¹, involved a state statute requiring children to attend public schools. The United States Supreme Court struck the statute for unconstitutionally interfering with “the liberty of parents and guardians to direct the upbringing and education of children under their control”.²² In the second case cited, *Meyer v. Nebraska*²³, the United States Supreme Court found unconstitutional a state statute forbidding the teaching of foreign languages to anyone not having graduated from the eighth grade. It stated that the state exceeded “the limitations upon the power of the state and conflicts with rights assured to plaintiff in error”.²⁴ Such “rights” were earlier said to include the rights of individuals “to marry, establish a home and bring up children”.²⁵

The questions of four personality tests commonly administered in the public schools were scrutinized in order to ascertain whether they invaded the protected familial privacy zone of childrearing. The Minnesota Multiphasic Personality Inventory²⁶ (hereafter MMPI), the Mooney Problem Checklist²⁷, the California Personality Inventory²⁸ (hereafter CPI), and the Wood “Behavior Preference Schedule: What Would You Do”²⁹ were chosen because of their availability³⁰ and their popularity.³¹ All of them have been in use for more than fifteen years and all of them are highly structured.

The MMPI is a battery of approximately 570 statements which the respondent designates as being either true or false about himself.³² That inventory has questions directly related to childrearing: “My parents and family find more fault with me than they should,”³³ “I have been quite

independent and free from family rule,"³⁴ and "My mother or father often made me obey even when I thought it was unreasonable."³⁴

The Wood "Behavior Preference Record: What Would You Do", given to children in grades four through twelve, also asks children about childrearing matters. It consists of descriptions of various hypothetical situations. For each situation three possible courses of action are described. The respondent selects which of the three listed courses of action he would pursue in that situation and then selects one of at least four possible listed reasons for his behavior choice. In one hypothetical situation the child is to imagine himself about to leave to play baseball "with the gang" when his mother asks him to take his little sister along. He knows that "the gang" will laugh at him. The suggested possible behaviors are (1) do it anyway (take the sister), (2) stay at home, and (3) explain why you don't want to do it. Possible reasons for the chosen behavior include "It wouldn't do any good to explain [to the mother]" and "Mother would understand and would not make you do it."³⁶

The CPI is structurally similar to the MMPI. It contains approximately 500 statements which respondent's classify as either true or false about themselves. It posits such statements as "My parents have often disapproved of my friends," "My parents wanted me to 'make good' in the world" and "My people treat me more like a child than a grownup."³⁷

A final example is drawn from the junior high school form of the Mooney Problem Checklist. Junior high school students are presented with 210 statements delineating possible subjective or objective conditions. They are to mark those states of affairs that bother them. A space is provided where they can indicate whether or not they would like to talk to a school counselor about the bothersome areas. Among the things listed for the students to designate as "problems" were "having to ask parents for money", "having no regular allowance", "not allowed to run around with the kids I like," "being treated like a small child at home", "not allowed to have dates," and "being criticized by my parents".³⁸ Clearly, under the *Merriken* decision, all of the above-described questions would be unconstitutional intrusions into the realm of childrearing.

The protected zone of emotional family relationships has fared no better in the inventories. For example, Miller reports that a thirty-one page questionnaire that inquired into such things as which party was at fault if the home was a "broken" one was given to seventh and ninth grade students in Durham, North Carolina.³⁹

The MMPI asks subjects to respond to statements such as "My father was a good man," "I love my father very much," "I have reason to feel jealous of one or more members of my family,"⁴⁰ and "Some of my family have habits that bother and annoy me very much."⁴¹

Students given the CPI are asked whether or not "Some of my family have quick tempers," "My home life was always happy," "At times I have been very anxious to get away from my family," "I have often gone against my parents' wishes," "I have felt embarrassed over the type of

work that one or more members of my family have done,” “The things some of my family have done have frightened me,” “My parents never really understood me” and are also asked to name the relative that they are the “most attached to”.⁴²

The Mooney Problem Checklist offers “never having any fun with mother or dad”, “family worried about money”, “parents separated or divorced”, “parents favoring a brother or sister”, “unable to discuss certain problems at home”, “family quarrels”, and “wanting to live in a different neighborhood” as sources of possible worry for a child.⁴³

Furthermore, although the *Merriken* court did not specifically reach the issue, strong arguments can be made for zones of privacy existing beyond the family relationship. The majority opinion of *Griswold* referred to penumbras of privacy derived from the First and Fifth Amendments. In First Amendment zones of privacy, the court stressed that privacy was important to the freedom of association. Concern was expressed that a required exposure of beliefs, attitudes or associations would tend to chill the expression of First Amendment rights.⁴⁴ This theme had been expressed several years earlier in *Shelton v. Tucker*⁴⁵ and in *NAACP v. Alabama*⁴⁶. In *Shelton*, the constitutionality of a state requirement that school teachers disclose every organization with which they were associated was at issue. In striking the requirement, the United States Supreme Court stated that such a requirement would “impair that teacher’s right to free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundations of a free society.”⁴⁷ Two years before deciding *Shelton*, the Supreme Court indicated its position by noting a “vital relationship” between the freedom of association and the privacy of association in *NAACP*.⁴⁸ Consequently, it would seem that personality test questions revealing the family unit’s political or religious ties would be extremely objectionable.

Nevertheless, they abound. The MMPI requests reactions to such political issues as “I am always disgusted with the law when a criminal is freed through the arguments of a smart lawyer”⁴⁹ and “It would be better if almost all laws were thrown away.”⁵⁰ It directly inquires about religious beliefs with the statements “Evil spirits possess me sometimes,” “I believe in a life hereafter,”⁵¹ “My soul leaves my body,” “I am a special agent of God,” “I believe there is a Devil and a Hell in afterlife,” “I read the Bible several times a week” and “I pray several times a week.”⁵²

The CPI also posits such politically relevant statements as “Maybe some minority groups do get rough treatment, but it is no business of mine,” “Only a fool would ever vote to increase his own taxes,” “We ought to let Europe get out of its own mess; it made its bed, let it lie in it,” “People should not have to pay taxes for the schools if they do not have children” and “Disobedience to my government is never justified.”⁵³

The Fifth Amendment’s relationship to rights of privacy may also present problems for personality tests. The United States Supreme Court has held that incriminating statements gained as a result of custodial

interrogations are not admissible evidence in criminal prosecutions, *Miranda v. Arizona*.⁵⁴ Although the case is not a strong one, parallels can possibly be drawn between custodial interrogations and the school testing setting. Therefore, questions on personality tests directly relating to criminal activities and perhaps those relating merely to criminal propensities may violate the Fifth Amendment guarantee against self-incrimination if the responses to them are introduced in juvenile proceedings.

Once again, the widely used MMPI appears as a culprit. It elicits information concerning acts constituting possible felonies in certain states by requiring answers to "I have never been in trouble with the law," "I have never been in trouble because of my sexual behavior," "I have never indulged in any unusual sexual practices,"⁵⁵ and "At times it has been impossible for me to keep from stealing or shoplifting something."⁵⁶ Miller reports that typical questions on personality tests include "Have you ever engaged in sexual activities with another man or boy" (asked of males)⁵⁷.

In addition, information reflecting criminal propensities is routinely asked of students. An example is the question: "If I could get into a movie without paying and be sure I was not seen I would probably do it."⁵⁸ The CPI asks, "At times I have been so entertained by the cleverness of a crook that I have hoped he would get by with it," "I used to steal sometimes when I was a youngster," "If a person is clever enough to cheat someone out of a large sum of money, he ought to be allowed to keep it" and "Police cars should be specially marked so that you can see them coming."⁵⁹

LACK OF INFORMED CONSENT

A major underpinning of the *Merriken* court's decision was its finding that parents were not properly informed of the nature of the "Critical Period of Intervention" program. As the court had determined that certain of the test questions violated the plaintiff's fundamental rights of familial privacy, insufficiently informed parental consent to those questions was not considered to be a valid waiver of these rights. When First and Fifth Amendment privacy rights are involved, the nature of the consent required may be slightly different. While questions violating First Amendment privacy zones may violate parental interests, they also violate interests unique to the child, for the child, too, has an interest in maintaining the privacy of his associations, religious habits, *etc.* The Fifth Amendment's right against self-incrimination is even more peculiarly one vested solely in the child. Hence, questions as to whether parents can effectively waive their children's rights for them and whether children can effectively waive their rights themselves in view of their status as minors must be dealt with although they are beyond the scope of this paper.

Since the familial, First and Fifth Amendment privacy rights have all been termed fundamental (*supra*), it is to be assumed that the same standard for informed consent to their waiver would apply to all of them. The *Merriken* court indicated that an adequate waiver in such a case must be based on information of the same scope as is provided to surgery

patients.⁶⁰ Hence, such information should contain an extensive discussion of the possible direct and indirect ill effects of participation in the program and of the alternatives to participation in it.⁶¹ One reviewer has noted that the court's imposition of such a stringent standard or test to determine informed consent is a departure from previous practice in which trial judges decided from the facts presented whether the consent given was informed and voluntary instead of adhering to a specific test.⁶²

However, the *Merriken* court finds backing for its position in the United States Supreme Court's decision in *Fuentes v. Shevin*.⁶³ There the court held that a contractual waiver of the plaintiff's right to a hearing in a replevin proceeding was ineffective. The fact that the plaintiff was not sufficiently told of the nature and possible consequences of such a waiver was deemed sufficient to invalidate it.⁶⁴ The court further noted that there is a presumption against waivers of individual Constitutional rights in civil as well as criminal cases.⁶⁵

The mandate of *Brady v. United States*,⁶⁶ a criminal case, was also relied upon by the *Merriken* court to support the imposition of its high standards for waiver. In *Brady* the petitioner attempted to argue that his waiver of his right to a full trial through a guilty plea should be held invalid. In denying his claim, the United States Supreme Court stated that "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts *done with a sufficient awareness of the relevant circumstances and likely consequences.*"⁶⁷ (Emphasis added.)

Finally, there exists a further possible explanation and justification, for the adherence to such a high standard of "informed consent" in the administration of psychological tests: while the general populace is presumed to have notice of the law and hence its rights under the law, it is not presumed to have anything but a cursory level of knowledge about psychology. In fact, Sherrer and Roston assert that the amount of information readily available to and known by the populace with regard to personality testing procedures in the schools is likely actually to *be* similar to the information the populace has about surgery.⁶⁸ For example, they write that the majority of parents assume that any testing would be done by "experts" in the field and would be kept confidential. However, they report that the actual "school psychologist" usually only has a master's degree and probably received that degree not from a psychology department, as would be supposed, but from an education school. It is probable that such persons have not had an actual "internship" in the clinical psychological work.⁶⁹ In short, they would be considered "untrained" by experts. If parental knowledge about the administration of the school testing program is this meager, certainly parental knowledge of the test questions and purposes themselves can not be more plentiful. In addition, the *Merriken* court specifically cited the lack of psychological training that the "therapists" in the program had, perhaps intimating that there was a certain "experimental" element in that aspect of the program which might be harmful.⁷² It seems clear, therefore, that any descriptions of therapy should include the extent to which persons administering such therapy are qualified.

The *Merriken* court's findings of fact also took note of the potential harm done to the child by reason of his being exposed to the test questions at all.⁷³ Many of the test questions themselves could evoke anxiety in the subjects. For instance, asking young subjects whether they feel their parents understand them could suggest new evaluative perspectives to the students that could generate discontent. Asking them to choose the relative to whom they feel closest could spur guilt feelings and mixed emotions. Similarly, MMPI⁷⁴ questions related to one's satisfaction with one's sex life, one's predilection for members of the same sex, could have a traumatic effect on young children. Also, questions about slight paranoia, such as whether the subject feels that people are watching him much of the time would have a traumatic effect on some respondents.

Furthermore, the *Merriken* court mentioned a lack of clarity and specificity in the categorization of students as "drug abusers" as a shortcoming of the "Critical Period of Intervention" program. The inference to be drawn from this is that parents must be informed of all the possible "scales" or diagnoses that can be made from a test. After receiving such information, for instance, a parent may agree to have his child's personality tested for indications of possible schizophrenia but may not want his child's masculinity-femininity quotients indexed.

There are indications that subjects who are aware of a test's diagnostic purpose can confound test results by giving false responses.⁷⁵ For example, assume an adolescent male who knows he is being screened for homosexuality and who is knowledgeable about the Freudian belief that homosexuality is caused in part by an overly close relationship between the male and his mother. If he needed to, he could falsely describe his relationship with his mother as a distant one in order to receive an inaccurate, "normal" score.

Nevertheless, the possibility of the deliberate falsification of test results is not so great as to outweigh the interests parents have in being aware of what their children are being tested for. It is apparent that the average student is highly unlikely to actually possess the necessary sophistication in psychological theory to invalidate test scores. Additionally, as the knowledge of testing theory and design increases, more and more tests are incorporating built-in corrections for, or at least detections of, falsification of answers.⁷⁶

The interest parents have in knowing what their children are being tested for would not even be adequately protected if they could screen test questions and strike those they found too revealing. They simply would not be able to determine what it was that responses to the questions would be divulging without extensive training. For example, one of many questions on the MMPI indicating a person's predilection to depression is one asking if the respondent believes in the second coming of Christ.⁷⁷ The average person certainly could not know that a negative answer to this question would evince depressive tendencies. Nor could a reasonable person easily determine that whether or not he is easily awakened by noise and whether or not he has spells of hay fever or asthma indicates his depressive potential,⁷⁸ that whether or not he enjoys detective or

mystery stories and at times has felt like swearing indicates his potential for hysteria,⁷⁹ or that whether or not he likes school indicates his likelihood of being a psychopathic deviate.⁸⁰

Finally, the last informational requirement of the *Merriken* court's test for truly "informed" consent also involves the actual test questions themselves. The *Merriken* decision only tangentially noted this aspect by making a finding to the effect that parents were not given an opportunity in the Pennsylvania situation to see the test questions.⁸¹ However, it is obvious that parents must be able to have access to such information in order to make any sort of intelligent and "informed" decision about whether they would find waiving their rights of privacy objectionable.

Opponents can argue that prior exposure to test questions often is thought to invalidate test results in that responses are only properly "genuine" when they are spontaneous.⁸² However, such an argument would not carry much weight. In the school testing situation, the children, not the parents, are being tested. Therefore, parents could easily be allowed to review test questions at the school. If they were not allowed to take copies of the questions home with them the chances of their repeating actual test questions to their children would be diminished. Again, as was noted above, psychological testing techniques are becoming increasingly able to counter the problems caused by sophisticated subjects.

USE OF TEST RESULTS AS AN INVASION OF PRIVACY

The *Merriken* court also expressed deep concern about the fact that the test results would not be kept strictly confidential. In the fact situation presented, the court only needed to deal with the confidentiality of the diagnosis or categorization of the child resulting from an evaluation of his answers on the questionnaires given and not with the confidentiality of the specific answers given to the questions. However, there is no reason to believe that the same considerations would not apply to the confidentiality of both test answers and test diagnoses. The court stated that "the ultimate use of this information, although possibly gained with a great deal of scientific success, is the most serious problem that faces the court."⁸³

Budding judicial support for the court's concern with the confidentiality of psychological data is readily at hand. In *In re Lifschutz*⁸⁴ the Supreme Court of California denied a psychotherapist the right to assert that communications made to him by a patient were privileged when the patient himself wanted them introduced in evidence. In doing so, however, the court applied *Griswold's* privacy holding to the psychotherapist-patient relationship with the dicta that "[T]he United States Supreme Court declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within such zone."⁸⁵ Compelling policy reasons for extending a privileged, confidential status to the psychotherapist-patient relationship were given by the court in *Taylor v. United States*.⁸⁶ The trial court had admitted the testimony of a physician,

at the mental hospital in which the defendant had been confined until he was competent to stand trial, in finding him guilty of robbery, larceny and housebreaking. The federal appellate court held the admission of the testimony to be reversible error and stated that "Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have a patient's confidence or he cannot help him."⁸⁷ In view of the great similarity of personal student counseling to psychotherapy, no adequate reasons have been given for distinguishing between the two.

A rather strong argument for the confidentiality of student test results can be made even without judicial precedent. The four conditions generally required for communications to be considered privileged are (1) that confidentiality be essential to the satisfactory maintenance of the relationship, (2) that the communication originated with the expectation that it would be confidential, (3) that the relationship is one that should be fostered, and (4) that the injury to the relationship by the disclosure of communications is greater than the benefits from the disclosure.⁸⁸ The first condition, that of the privilege being essential to the relationship, appears to have been well established by the language of the *Lifschutz* and *Taylor* courts (*supra*).

The second condition, that the communications originated with the expectation that they be confidential also appears to be satisfied, at least in part. The physical setting in which most school counseling takes place would indicate to the students that the meeting, and therefore the relationship, is a confidential one. A survey in 1966-67 of Iowa schools revealed that 84% of the counseling rooms were private offices.⁸⁹ It would be natural for students to assume that any tests they took for guidance purposes would also be kept confidential, especially if they were taken in the guidance office.

Problems would remain, however, with test scores not received as a direct result of a counseling relationship or not received for counseling purposes. When tests are routinely given to an entire class of students in the same manner in which students' eyes are checked, a special, confidential counselor-student relationship with its accompanying expectations may be most difficult to prove. However, it should be remembered that the closeness of the student-counselor relationship is only relevant as an indicator of the student's *expectation* of confidentiality. Other factors may so strongly point to such an expectation as to override the factor of a distant relationship. In this instance the very nature of the test and the questions on it (see examples, *supra*) would strongly suggest that the communicator assumed that his responses would be kept private.

Satisfaction of the third condition, that the relationship is one that should be fostered, might appear to be self-evident. As the state itself provided for the counseling services in the first place, it could hardly be heard to argue that the relationship is one it has no interest in encouraging. The fourth condition, that the benefits of confidentiality outweigh the benefits of disclosure, involves the simple balancing of the interests involved. As the validity of test scores depends upon the students'

trust, it might seem that the assurance of confidentiality is so vital as to surpass any other considerations. Surely the specter of non-confidential but non-meaningful data being gathered is a ludicrous one.

Further discussion of the balancing of the various state and individual interests in personality testing is found *infra* with the discussion of the *Merriken* court's use of a balancing test.

The judicial precedent of the *Lifschutz* and the *Taylor* cases and the fact that the four requirements for privileged status could arguably be met by the school personality testing situation still would not alleviate the problems that concerned the *Merriken* court. The privileged status argued for would only prevent the test answers and diagnoses from being used in court. While it would protect students' Fifth Amendment rights against self-incrimination, it would do nothing to protect them from the dangers of "scapegoating" and labeling by school personnel and whomever else received access to the results.

How confidential are, and how restricted is access to, such diagnoses in the average school system? Before the recent passage of the federal "Buckley Amendment,"⁹⁰ only thirteen states had statutes explicitly protecting student-counselor communications.⁹¹ Of the thirteen statutes involved, seven restricted the privilege to counselors that were state certified,⁹² and eight of them provided for the waiver of the privilege in various special circumstances.⁹³ Of the eight that had waiver provisions, only four required the consent of the student or his parents to such waiver.⁹⁴ The remaining five statutes without waiver provisions have all been criticized for defects such as vagueness.⁹⁵ Thus, it was not at all certain whether personality test scores and diagnoses would necessarily be considered "student-counselor communications" under the five statutes. None of the statutes attempted to restrict school personnel, or even other outside parties such as prospective employers, from having access to the students' records. Therefore, each individual school system could use its discretion in dispensing personality test scores. Very little data exist on actual school practices in this regard. It is thought however, that the majority of school systems refused to disseminate the information gleaned from personality tests to persons outside the school system while they did allow interested teachers access to it.⁹⁶

The "Buckley Amendment" allays the problem of confidentiality somewhat. The act stipulates that for a school to receive federal funding, it may not release any portion of a student's records to any person without written parental consent specifying the records to be released and to whom they shall be released. These records specifically include personality test scores. A copy of the records must be made available to any parent desiring one and a list of persons receiving the information will be held to further protect its confidential status. It is unclear whether the *Merriken* court's complete test for "informed consent" should be applied to parental consent to the release of records involving personality measures as it is to the making of the record in the first place.

Exempted from the above requirements of parental consent are school officials, such as teachers; officials of other schools in which the child

will enroll as long as the parents know of the transfer, receive a copy of the record and have a chance to challenge information in it; authorized representatives of the Comptroller General of the United States, the Secretary, an administrative head of an education agency and state educational authorities; and offices to which the student has applied for financial aid.

The fact that other school personnel have access to whatever psychological diagnoses may have been made from personality inventories was exactly one of the concerns of the *Merriken* court. The lack of supplemental state regulation protecting psychological data has been noted above. Therefore, unless each school system itself enshrouds personality inventory results with a special, confidential status and restricts access to the school psychologist, the very dangers of labeling and scapegoating noted in the *Merriken* decision are still present.

THE MERRIKEN COURT'S "BALANCING" TEST

How are courts to resolve the remaining problem with confidentiality? Even when the *Merriken* standards for informed consent have been met, is it possible that the lack of proposed confidentiality or perhaps yet other problems with the program, such as ones with the predictive validity of the tests employed, would lead a court to prohibit its implementation? Language in the *Merriken* decision hints at the possibility that *all* personality testing would be unconstitutional whether informed consent were given or not. After discussing the lack of informed parental consent to the program, the court went on to stress that "the credibility of the confidentiality of this program breaks down when the potential drug abusers are reported to the school superintendent,"⁹⁷ that "[t]he actual testing of the student and the results gained are suspect"⁹⁸ and that "the margin of error must be almost nil"⁹⁹ before diagnostic labels are attached to students.

However, closer scrutiny demonstrates that the *Merriken* decision did not entail a blanket prohibition of all personality testing by the schools. Instead, the *Merriken* court employed a balancing test in coming to its resolution of the remaining problems in the program and limited its decision to the situation before it. It stated that "The Court, *in balancing the right of an individual to privacy and the right of the government to invade that privacy, strikes the balance in favor of the individual in the circumstances shown in this case.*"¹⁰⁰ (Emphasis added.) And earlier the court had stated that it "balances the invasion of privacy against the public need for a program."¹⁰¹

The *Merriken* court drew support for its imposition of a balancing standard from the opinion in *Barenblatt v. United States*.¹⁰² In that case, plaintiff Barenblatt was prosecuted for contempt for refusing to answer the questions of the House Committee on Un-American Activities concerning his past Communist activities. While the Supreme Court struck the balance in favor of the government, the case is important because it did employ a balancing test. The opinion stated that "where First Amendment rights are asserted to bar governmental interrogation resolution of the

issue always involves a balancing by the courts of the competing privacy and public interests at stake in the particular circumstances shown.”¹⁰³

Furthermore, balancing tests have been used with increasing frequency where privacy-related rights are involved. For example, the need for administrative searches was balanced against the intrusion of individual rights caused by such searches by the Supreme Court in *Camara v. Municipal Court*.¹⁰⁴ The state’s interest in regulating pornographic materials was found outweighed by an individual’s privacy rights in his own home by the Supreme Court in *Stanley v. Georgia*.¹⁰⁵

Undoubtedly the most influential case in establishing a balancing approach in privacy litigation was the aforementioned *Roe v. Wade*. In it the Supreme Court determined that an individual’s right of privacy encompassed the right of a woman to terminate an unwanted pregnancy. In balancing that individual interest against the state’s interest in the health of the woman, the court concluded that the individual’s interest was the weightier for the first trimester of pregnancy, that the two interests were at a near stand-off during the second trimester, therefore allowing such state regulation as was reasonably related to the state interest, and that the state’s interest became so compelling in the third trimester that it justified an encroachment on the individual rights involved.

Exactly what individual interests did the *Merriken* court balance against the state benefits from personality testing? The quoted language above, that the court “balances the invasion of privacy against the public need for a program”, seems to provide a straightforward answer to the question; the court simply looked at the extent to which privacy interests were violated. When the invasion of privacy by the testing program reached a certain point in magnitude, became such a large or serious invasion as to outweigh any possible benefits to the state, then the testing program was enjoined.

However, a second look at the *Merriken* court’s opinion indicates that the individual interests that the court balanced against those of the state are not that simple; they are not simply the individual interests in the maintenance of privacy. Actually, the court looked to the entire needs of the individual — not just to his need for privacy. Once it determined that an individual’s privacy was violated, it looked beyond the violation to the damage that such a violation did to an individual’s other interests. The predilection of the court to look beyond the privacy interest violated was evidenced in its concern that parents be informed not only of the ways in which the test intruded upon their and their child’s privacy, but also of the ways in which the testing program could negatively affect their child. In specifically stating the reasons for enjoining the “Critical Period of Intervention” program, the court noted both the lack of informed consent received and the fact that “[t]here is too much of a chance that the wrong people for the wrong reasons will be singled out and counseled in the wrong manner.”¹⁰⁶ The quoted statement clearly shows that the court looked to the total possible harm to the individual, not just the harm to individual privacy interests. Being wrongly singled

out and then “counseled in the wrong manner” has little relation to privacy. However, its possible harmful effect to the person so counseled is clear. Therefore, it would seem that the state could justify invasions of privacy only when the benefits to the state were greater than the total injuries to the individual caused by the invasion, instead of merely when the benefits to the state outweighed the extent of the privacy invasion.

The court’s looking beyond the privacy interest invaded to the harm caused by the invasion is not totally unprecedented. Another case in which privacy rights were litigated was *Roe (supra)*. In reaching its decision in *Roe* the Supreme Court also did not restrict itself to merely determining the extent to which privacy rights were invaded, but balanced the total possible injury to the individual by the violation of privacy against the state’s interest. That is, immediately after communicating in one sentence that a woman’s right to privacy encompasses her right to terminate unwanted pregnancies, the court launched into a discussion of the various evils to the woman that would occur if such a right were not protected.¹⁰⁷

Balancing of the individual privacy interests vs. state interests

An interesting question left unresolved to date is what the state’s interest in personality testing is, *i.e.*, what the state benefits are against which the harm to individuals is balanced, and whether those benefits could legally be characterized as constituting a “compelling” state interest.

The *Merriken* opinion did not explicitly term the state’s interest in a student’s possible personality aberrations to be a “compelling” one. It did, however, specifically designate the individual interest involved to be a “fundamental” one (*supra*). It also very obviously used a “balancing” method of analysis (*supra*). One observer has asserted that, to date, the use of a balancing test has only been sanctioned by the United States Supreme Court when both a “fundamental” individual right and a “compelling” state interest have been found.¹⁰⁸ Both the *Roe* and *Barenblatt* cases were cited as supporting this assertion; in both cases the Supreme Court did find both an existent “compelling” state interest and a “fundamental” individual interest before employing a balancing test.¹⁰⁹ As the *Merriken* court had found the individual interest before it to be a fundamental one, had not designated the state interest before it to be a compelling one, and did employ a balancing test, three possible explanations for its use of the balancing test can be made: (1) that the *Merriken* court erred in applying a balancing mode of analysis because a fundamental individual interest *automatically* overrides all but “compelling” state interests; (2) that the court effected a *de facto* elevation of the status of the state’s interest to that of a “compelling” one since it did use a balancing test; or (3) that the court did not “err” in its use of a balancing test but that judicial precedent exists for the balancing of fundamental rights against non-compelling state interests.

It is obvious that if the first explanation — that the *Merriken* court simply erred in its use of a balancing test to resolve a clash between fundamental individual interests and non-compelling state interests — is accepted, then state interests in personality testing have not yet been

labeled “compelling”. Likewise, if the third explanation—that the court had support for applying a balancing test without having made a prior determination that a “compelling” state interest was abridging a “fundamental” individual one — is accepted, state interests in such testing have not been given “compelling” status. Only the second explanation would purport to give it such status.

Of course, *post hoc* explanations of what a court intended by its behavior are always tenuous at best. In this case, it seems that the third explanation is the one most supported by the court’s opinion. Other than one brief mention of the state’s interest in “possibly prevent[ing] drug abuse”,¹¹⁰ the court gives no indication that the state’s interest is a highly valued one, gives no indication at all that it considered it a “compelling” one. However, the court does demonstrate that it believes its employment of a balancing technique is supportable; it made a point of drawing attention to its use of the balancing test (*supra*). It stated that “The court recognizes that the Supreme Court has spoken and Law Review authorities have spoken about a balancing test. What this means is that the Court balances the invasion of privacy against the public need for a program. . . .”¹¹¹ The above language contains no hint that the *Merriken* court felt that the Supreme Court or the “Law Review authorities” still required a prior finding of a compelling state interest. Therefore, it supports the interpretation that the court felt that applying a balancing test without finding “compelling” and “fundamental” interests was supportable.

What does such a balancing approach imply for the future resolution of cases factually similar to *Merriken*? The various negative effects of school personality testing were delineated by the *Merriken* court (*supra*) as including (1) a possible “self-fulfilling prophecy” effect, where a child diagnosed and labeled as having certain problems simply fulfills the expectations of the persons around him and actually develops such problems; (2) a “scapegoating” effect, where a child diagnosed as having problems or a child refusing to be tested is singled out by his teachers or his peers for unpleasant attention; (3) a traumatic effect just from being exposed to certain test questions; and, (4) the possible harmful effects of receiving therapy from persons other than trained psychologists. When the rather high probability that a misdiagnosis will be made is considered along with the above possible effects of a correct diagnosis, the state’s interest in the testing must be an overwhelmingly high one in order to justify the possible harm it could cause.

Since the state’s interest in personality testing by the schools has not yet been characterized as even a compelling one, it is unlikely to outweigh the dangers judicially found to be caused by it. However, future courts may easily find the state’s interest to be more significant — perhaps even compelling — if the fact situation were to be slightly different from the one presented in *Merriken*. The only interest presented to the *Merriken* court was one of ferreting out potential drug abusers. It is very probable that a school testing program whose purpose is the detection of serious existing personality defects would be thought of much more highly. The sound mental health of the general populace is

essential to American society and there is now evidence that special efforts must be made to maintain such mental health. As early as 1962, an estimated 2.5 million to 4.5 million out of approximately 60 million children under the age of fourteen were in need of psychological counseling or therapy.¹¹²

The schools are the logical agency to do such testing. If all children are to be routinely tested, the schools provide the most convenient site for the testing because the children are all gathered there in an orderly manner. If only certain children, those ready suspected of having personality aberrations, are to be tested, authorities assert that deciding which children should be tested is not best left to parents.¹¹³ It is noted that a child's teachers are more able to detect abnormalities than are parents because they compare the child to a classroom of peers. Teachers are also apt to be more knowledgeable about community health agencies than are parents. In addition, it is urged that a child's teachers should have access to test results.¹¹⁵ The teachers are said to spend the first few months of class time making their own subjective determinations of their students' psychological needs. If, instead, they had professional evaluations of their students' needs, they would not have to waste those few months of class and could begin meeting the children's needs sooner.¹¹⁶

A court balancing these state considerations against the harm caused by testing might have a more difficult time in "striking the balance for the individual" than the *Merriken* court did. Certainly a demonstration of the pervasiveness of mental problems among school children could convince a court to class the state's interest in detecting and treating such problems in the schools "compelling". However, it is to be doubted that a court would be persuaded by the portion of the argument in favor of teachers' having access to test results. In view of school teachers' extremely minimal training in psychology, the extent to which they can be of value to students with severe personality disorders is speculative and the possible detriment they can do to students through labeling and "scapegoating" is clear. At the very least, therefore, a school testing program attempting to justify its invasion of familial privacy must still provide for strict confidentiality in order to substantially reduce the negative effects that can flow from that invasion of privacy.

The question remains whether the benefits from such a program will then justify its invasion of familial and individual privacy. Can the state interest in a school personality testing program that employs tests of high predictive validity, that guards against labeling and "scapegoating" effects by restricting access to test answers and results to qualified school psychologists, and that provides for fully informed consent by parents in accordance with the *Merriken* standards, outweigh the individual interests involved? Since the negative effects of testing to the individual would be minimized, the state interest would be primarily balanced against the individual privacy interest invaded by test questions and diagnoses.

That the right of privacy is highly regarded in legal circles is demonstrated in Westin's book, *Privacy and Freedom*.¹¹⁷ In it he asserts that the right of privacy performs four services vital to a free society: (1)

it protects the personal autonomy and development of individuality that is necessary for a successful democracy, (2) it provides for the emotional release necessary to the successful maintenance of social roles in public, (3) it allows for self-evaluation and the integration of individual experiences, and (4) it ensures that communications are protected so as to encourage intimate relationships.¹¹⁸ Naturally, it is difficult to see how any governmental interest could be said to outweigh the need to ensure the continued success of a democratic form of government!

Nevertheless, the governmental interest in personality testing can also be described as one necessary for the maintenance of a democracy. It is obvious that persons with severe personality malfunctions are not capable of taking part in the democratic process. Anti-social actions by such persons could wreak enough havoc to upset the entire existing social order. Furthermore, personality testing has no effect whatsoever on necessary emotional release, self-evaluation and integration, and intimate relationships. The only above-listed function of privacy that personality testing could possibly encroach upon is the first one, the protection of personal autonomy and the development of individuality. However, it would appear axiomatic that interests in individuality *per se* could not possibly go so far as to protect mentally unsound individuals.

It has also been noted that the extent to which families are "private" largely determines the extent to which they are "functional". Since recent court decisions have protected familial privacy, it is argued that the functionality of families in this culture must be highly valued.¹²⁰

The argument, however, is much too simple. One "function" of a family is to produce mentally sound individuals. As the goals of the family and of the testing program are both to produce mentally healthy persons, the question to be resolved is whether a school testing program would further that goal more effectively than would its prohibition, *e.g.*, the family left to its own devices. When the testing program is especially tailored (as above described), bringing all possible harmful effects from its implementation to a minimum, and its major remaining drawback is a *per se* violation of familial and/or individual privacy, it would appear that the violation of privacy is justified by the benefits to the state in fostering the mental health of its populace.

FOOTNOTES

- ¹See P. Aires, "Social Organization and the Family", in A. Skolnick and J. Skolnick, *FAMILY IN TRANSITION*, 1971, pp. 90-105.
- ²E.g., *The March of Dimes*, The National Association for Mental Health.
- ³E.g., National Institute of Mental Health grants, National Institute of Health grants.
- ⁴D. Hermann III, "Privacy, the Prospective Employee, and Employment: the Need to Restrict Polygraph and Personality Testing", 47 WASH. L. REV. 73, (1973) 103 (hereafter cited as Hermann).
- ⁵*Id.*, p. 103.
- ⁶J. Green, *INTRODUCTION TO MEASUREMENT AND ASSOCIATION* (1970), p. 138.
- ⁷A. Miller, *THE ASSAULT ON PRIVACY* (1971), p. 100 (hereafter cited as Miller).
- ⁸Hermann, p. 130.
- ⁹Hearings Before the Subcomm. on a Special Inquiry on Invasion of Privacy of the House Comm. on Governmental Operations, 89th Cong., p. 346 (1965) (hereafter House hearings).
- ¹⁰"Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools", 56 IA. L. REV. 1323, 1327 (1971) (hereafter Testimonial Privilege).
- ¹¹364 F. Supp. 913 (E.D.Pa. 1973).
- ¹²*Id.*, at 916.
- ¹³*Id.*, at 918.
- ¹⁴381 U.S. 479 (1965).
- ¹⁵*Id.*, at 491.
- ¹⁶410 U.S. 113 (1973).
- ¹⁷"Personality Test Used by School to Identify Potential Drug Abusers Without Informed Consent of Parents Violates Student's and Parent's Right of Privacy", 27 VA. L. REV. 372, 374 (1974) (hereafter cited as "Personality Test") citing *Murphy v. Houma Well Serv.*, 413 F. 2d 509 (5th Cir. 1969) (search of parentage to determine legitimacy of children for priorities under will not allowed); *Buchanan v. Batchelor*, 309 F. Supp. 729 (N.D. Tex. 1970) (sodomy law declared unconstitutional after a consenting married couple challenged it).
- ¹⁸364 F. Supp. 913, 918.
- ¹⁹321 U.S. 158 (1944).
- ²⁰*Id.*, at 166.
- ²¹268 U.S. 510 (1925).
- ²²*Id.*, at 534-35.
- ²³262 U.S. 390 (1923).
- ²⁴*Id.*, at 402.
- ²⁵*Id.*, at 399.
- ²⁶S. Hathaway and J. McKinley, *MINNESOTA MULTIPHASIC PERSONALITY INVENTORY* (1942).
- ²⁷R. Mooney, *MOONEY PROBLEM CHECK LIST — JUNIOR HIGH SCHOOL FORM* (1950) (hereafter cited as Mooney).
- ²⁸H. Gough, *CALIFORNIA PSYCHOLOGICAL INVENTORY — SPECIMEN SET* (1956) (hereafter cited as CPI).

²⁹H. Wood, BEHAVIOR PREFERENCE RECORD: WHAT WOULD YOU DO? (1953).

³⁰Personnel in the Department of School Psychology and in the Department of Counseling and Guidance at Indiana University informed me that access to the actual test questions was restricted to qualified persons in the field. However, I was able to purchase copies of the CPI and the Mooney Problem Checklist in the campus bookstore without any questions as to my qualifications. The questions on the MMPI were gleaned from Dahlstrom's book, *infra*, which is available at most medical and university libraries.

³¹Personal communication; data concerning the actual extent to which personality tests are used by the schools are scarce and fragmented. Indications of their use, however, are found in the fact that the MMPI was given to 15,000 ninth graders in Minnesota in 1957. It is additionally reported by W. Dahlstrom and G. Welsh to have been given to eighth through twelfth graders in Kentucky, California and North Carolina. *An MMPI Handbook* (1960), p. 5 and it or tests similar to it were described as routinely used by school guidance systems in Hearings Before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary, 89th Cong. p. 285.

³²357 U.S. 449 (1958).

³³W. Dahlstrom and G. Welsh, AN MMPI HANDBOOK (1960), p. 5 (hereafter cited as Dahlstrom).

³⁴*Id.*, p. 59.

³⁵*Id.*, p. 68.

³⁶H. Wood, BEHAVIOR PREFERENCE RECORD: WHAT WOULD YOU DO? (1953).

³⁷CPI.

³⁸Mooney.

³⁹Miller, p. 100.

⁴⁰Dahlstrom, p. 50.

⁴¹*Id.*, p. 63.

⁴²CPI.

⁴³Mooney.

⁴⁴381 U.S. 479, 483 (1965).

⁴⁵364 U.S. 479 (1960).

⁴⁶357 U.S. 449 (1958).

⁴⁷364 U.S. 479, 485-86.

⁴⁸357 U.S. 449, 462.

⁴⁹Dahlstrom, p. 59.

⁵⁰*Id.*, p. 50.

⁵¹Hearings Before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary, 89th Cong., p. 26 (hereafter Senate hearings).

⁵²S. Hathaway, "Psychology in Action — MMPI: Professional Use by Professional People", 19 AM. PSYCHOLOGIST (1964).

⁵³CPI.

⁵⁴384 U.S. 536 (1966).

⁵⁵Dahlstrom, p. 63.

⁵⁶*Id.*, p. 50.

⁵⁷Miller, p. 95.

⁵⁸Dahlstrom, p. 48.

⁵⁹CPI.

⁶⁰364 F. Supp. 913, 920.

⁶¹See *Canterbury v. Spence*, 464 F. 2d 772 cert. denied 409 U.S. 1064 (1972).

⁶²"Constitutional Law — Right of Privacy — School Program Designed to Identify and Provide Corrective Therapy for Potential Drug Abusers Held Unconstitutional", 2 FORDHAM URB. L. J. 599 (1974), p. 605 (hereafter "Constitutional Law").

⁶³407 U.S. 67 (1972).

⁶⁴*Id.*, at 96.

⁶⁵*Id.*, at 95.

⁶⁶397 U.S. 742 (1970).

⁶⁷*Id.*, at 748.

⁶⁸C. Sherrer and R. Roston, "Some Legal and Psychological Concerns About Personality Testing in the Public Schools", 30 FED. BAR J. 111, 114 (1971) (hereafter Sherrer and Roston).

⁶⁹*Id.*

⁷⁰364 F. Supp. 913, 919.

⁷¹*Id.*, at 920.

⁷²It is also to be noted that 20 U.S.C. § 1232h also requires that parents be allowed to inspect any experimental instructional materials or programs. Hence, to the extent that therapy can be termed "instructional" it is required by federal law to be extensively detailed to parents.

⁷³364 F. Supp. 913, 915.

⁷⁴Dahlstrom, p. 5.

⁷⁵Personal communication.

⁷⁶For instance, the MMPI has a built-in scale to determine if responses are false.

⁷⁷Senate hearings, p. 54.

⁷⁸Dahlstrom, p. 55.

⁷⁹*Id.*, p. 58

⁸⁰*Id.*, p. 62.

⁸¹364 F. Supp. 913, 914.

⁸²Personal communication.

⁸³364 F. Supp. 913, 920.

⁸⁴2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557 (1970).

⁸⁵*Id.*, at 401.

⁸⁶222 F. 2d 398 (D.C. Cir. 1955).

⁸⁷*Id.*, at 401.

⁸⁸L. Caruso, "Privacy of Students and Confidentiality of Student Records", 22 CASE WESTERN RESERVE LAW REVIEW 379, 384 (1971).

⁸⁹Testimonial Privilege, p. 1333.

⁹⁰20 U.S.C. § 1232g.

- ⁹¹K. Voltz, "Law of Confidentiality", 1964 LAW OF COUNSELING AND GUIDANCE 5 (1964).
- ⁹²W. Robison, "Testimonial Privilege and the School Guidance Counselor", 25 SYRACUSE L. REV. 911, 919 (1974) (hereafter Robinson).
- ⁹³*Id.*, at 922.
- ⁹⁴*Id.*
- ⁹⁵*Id.*, at 923.
- ⁹⁶Personal communication.
- ⁹⁷364 F. Supp. 913, 920.
- ⁹⁸*Id.*
- ⁹⁹*Id.*
- ¹⁰⁰*Id.*, at 921.
- ¹⁰¹*Id.*, at 920.
- ¹⁰²360 U.S. 109 (1959).
- ¹⁰³*Id.*, at 126.
- ¹⁰⁴387 U.S. 523 (1967).
- ¹⁰⁵394 U.S. 557 (1969).
- ¹⁰⁶364 F. Supp. 913, 921.
- ¹⁰⁷410 U.S. 113, 153.
- ¹⁰⁸"Constitutional Law," p. 609.
- ¹⁰⁹*Id.*
- ¹¹⁰364 F. Supp. 913, 920.
- ¹¹¹*Id.*
- ¹¹²C. Hersch, "Mental Health Services and the Poor", 29 PSYCHIATRY 236, 237 (1966).
- ¹¹³E. Mumford, "Promises and Disaffection in Mental Health Programs in the Schools", 7 PSYCHOLOGY IN THE SCHOOLS 20, 21 (1970).
- ¹¹⁴*Id.*
- ¹¹⁵S. Smith and J. Solanto, "An Approach to Pre-School Evaluations", 8 PSYCHOLOGY IN THE SCHOOLS 142, 143 (1971).
- ¹¹⁶*Id.*
- ¹¹⁷A. Westin, PRIVACY AND FREEDOM (1967).
- ¹¹⁸*Id.*
- ¹¹⁹D. Brodie, "Privacy: the Family and the State", 1972 U. OF ILL. L. FORUM 743, 759 (1972).
- ¹²⁰*Id.*